

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Petitions for Waiver of Universal Service High-) WC Docket No. 08-71
Cost Filing Deadlines)
SureWest Telephone Petition for a Waiver of)
Section 54.314(d) Filing Deadlines for)
Submission of State Certification of Federal High-)
Cost Support)

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 2016

Released: October 26, 2016

By the Commission: Commissioner Pai concurring and issuing a statement.

I. INTRODUCTION

1. In this Order, we deny an application for review, filed by SureWest Telephone (SureWest), of a decision by the Wireline Competition Bureau (Bureau) denying SureWest’s request for waiver of the state certification deadline required by section 54.314(d) of the Commission’s rules.1 We conclude that SureWest has failed to establish any grounds to overturn the Bureau’s decision.

II. BACKGROUND

2. Applicable Rules. Section 254(e) of the Communications Act of 1934, as amended, provides that “only an eligible telecommunications carrier [(ETC)] designated under section 214(e) shall be eligible to receive specific Federal universal service support,”2 and such support shall be used “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”3 To implement this statutory requirement, the Commission has adopted various certification and data filing requirements.

3. In the USF/ICC Transformation Order, the Commission adopted several reforms to harmonize and update annual ETC requirements by establishing a “uniform national framework for

1 SureWest Telephone Application for Review, WC Docket No. 08-71 (filed Nov. 26, 2013) (SureWest Application for Review); Petitions for Waiver of Universal Service High-Cost Filing Deadlines; SureWest Telephone Petition for Waiver of Section 54.314(d) Filing Deadlines for a Submission of State Certification of Federal High-Cost Support, Order, 28 FCC Rcd 14852 (WCB 2013) (SureWest Waiver Order). See also 47 CFR § 54.314(d). SureWest has since changed its name to Consolidated Communications of California Company. See Letter from David H. Solomon, Counsel to SureWest Telephone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-71 (filed June 30, 2016).

2 47 U.S.C. § 254(e).

3 Id.

accountability” that replaces the various data and certification filing deadlines.⁴ Such an accountability framework is “critical to ensure appropriate use of high-cost support and to allow the Commission to determine whether it is achieving its goals efficiently and effectively.”⁵ The framework incorporated annual unified reporting and certification procedures.⁶ Relevant to this Order, the *USF/ICC Transformation Order*’s accountability framework includes a modified requirement for states to certify annually that the federal universal service high-cost support provided to ETCs within the state “was used in the preceding calendar year and will be used in the coming calendar year only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”⁷ The first of these certifications was due on October 1, 2012.

4. The *USF/ICC Transformation Order* also adopted rules for support reductions for annual filings in an attempt to better calibrate the consequences resulting from missed annual filing deadlines. Under the rules in effect at the time in question, filing the state certification after October 1 resulted in the ETC losing one quarter of support in the subsequent year, filing after January 1 resulted in the ETC losing two quarters of support, filing after April 1 resulted in the subject ETC losing three quarters of support, and filing after July 1 would result in the ETC losing all support in the subsequent year.⁸

5. *SureWest’s Application for Review*. On September 28, 2012, the California Public Utilities Commission (PUC) timely filed a list of ETCs for which it made the required annual certification, in advance of the deadline of October 1, 2012.⁹ The California PUC’s list of ETCs did not include SureWest.¹⁰ SureWest claims it was confused due to changes in the certification requirements for high-cost support and the fact that its high-cost support status changed after being acquired by a price cap carrier, and thus SureWest did not file a sworn statement with the California PUC before the state was required to make the annual certification.¹¹ On January 24, 2013, seven days after it was contacted by the Universal Service Administrative Company (USAC) about the missing certification, SureWest filed for certification with the California PUC and filed a petition for waiver of the deadline.¹² On February 19, 2013, the California PUC filed a certification with respect to SureWest pursuant to section 54.314 of the

⁴ *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17850, para. 573 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

⁵ *Id.*

⁶ *See, e.g.*, 47 CFR §§ 54.313, 54.314.

⁷ 47 CFR § 54.314(a). ETCs not subject to state jurisdiction must file a similar certification on their own behalf. 47 CFR § 54.314(b). *See also USF/ICC Transformation Order*, 26 FCC Rcd at 17859, para. 609.

⁸ 47 CFR § 54.314(d) (2012). *See also USF/ICC Transformation Order*, 26 FCC Rcd at 17862-63, para. 617 & n.1011. Subsequent to SureWest’s missed filing, the Commission revised these support reduction rules for the section 54.313 annual report and section 54.314 annual certification. 47 CFR §§ 54.313, 54.314; *Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644, 15690-93, paras. 130-38 (2014) (*December 2014 Connect America Order*). Under the revised rule, a minimum reduction of support equivalent to seven days of support is imposed, and then support is reduced further on a day-by-day basis until the high-cost recipient files the required report or certification. 47 CFR §§ 54.313(j), 54.314(d); *December 2014 Connect America Order*, 29 FCC Rcd at 15690, para. 131.

⁹ Letter from Paul Clanon, Executive Director, State of California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Sept. 28, 2012).

¹⁰ *Id.* at Attach.

¹¹ SureWest Application for Review at 4.

¹² *See* SureWest Telephone Petition for Waiver of Section 54.314(d) Filing Deadlines for Submission of State Certification of Federal High-Cost Support, WC Docket No. 08-71, at 3-4, Exh. A (SureWest Waiver Petition).

Commission's rules.¹³ The Bureau denied SureWest's petition, finding that SureWest's "mere confusion" regarding the Commission's rules was not sufficient to establish good cause for waiver and that SureWest failed to quickly correct its error.¹⁴ SureWest filed the instant application for review alleging that the Bureau's order did not address material facts raised in SureWest's petition for waiver and that the Bureau's decision was inconsistent with precedent and policy.¹⁵

6. *Standard of Review.* Section 1.115 of the Commission's rules specify the factors that warrant Commission consideration of the issues presented in an application for review of action taken pursuant to delegated authority.¹⁶ The Commission considers, among other things, whether the action taken is in conflict with case precedent or established Commission policy; whether it was based upon an erroneous finding as to an important or material question of fact; or whether there was prejudicial procedural error.¹⁷

III. DISCUSSION

7. We conclude that SureWest has failed to establish any basis to overturn the Bureau's decision that SureWest failed to demonstrate that there is good cause to waive the section 54.314 state certification filing deadline, and thus we deny SureWest's application for review.¹⁸ We conclude that under the framework that existed at the time SureWest missed its deadline and at the time it filed its waiver request, SureWest failed to establish good cause for waiver.

8. First, we find that the Bureau's decision that SureWest had failed to establish special circumstances did not conflict with existing precedent or policy. SureWest claims it missed the deadline because it was confused due to changes in the Interstate Common Line Support (ICLS) certification, noting that, effective October 2012, SureWest became an affiliate of a price cap carrier when it was acquired by Consolidated Communications Holdings, Inc., thereby changing its high-cost support status.¹⁹ The Bureau's finding that SureWest did not demonstrate that it missed the filing deadline due to special circumstances is consistent with well-established precedent in the high-cost context and in other universal service programs that "confusion regarding the rules does not establish special circumstances that warrant deviation from the Commission's rules."²⁰

¹³ Letter from Paul Clanon, Executive Director, State of California Public Utilities Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Feb. 19, 2013).

¹⁴ *SureWest Waiver Order*, 28 FCC Rcd at 14854-55, para. 6.

¹⁵ See generally *SureWest Application for Review*.

¹⁶ 47 CFR § 1.115. See also 47 U.S.C. § 155(c)(4)-(7).

¹⁷ 47 CFR § 1.115(b)(2).

¹⁸ Generally, the Commission's rules may be waived for good cause shown. 47 CFR § 1.3. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166. Waiver of the Commission's rules is appropriate if special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest. *Northeast Cellular*, 897 F.2d at 1166.

¹⁹ See *USF/ICC Transformation Order*, 26 FCC Rcd at 17713, 17862, paras. 129, 614 (freezing support under existing high-cost support mechanisms for price cap carriers and their rate-of-return carrier affiliates and requiring all carriers to file a final ICLS certification June 30, 2012 covering the 2012-13 program year).

²⁰ *Federal-State Joint Board on Universal Service; South Slope Cooperative Telephone Company Petition for Waiver of Filing Deadline in 47 C.F.R. Section 54.307(c)*, Order, 19 FCC Rcd 17493, 17494, para. 5 (WCB 2004); *Federal-State Joint Board on Universal Service; NPI-Omnipoint Wireless, LLC Petition for Waiver of Sections 54.307(c), 54.802(a), and 54.903 of the Commission's Rules et al.*, Order, 22 FCC Rcd 4946 (WCB 2007) (*NPI-*

(continued....)

9. We are also not convinced by SureWest's suggestion that the Bureau should have granted the requested waiver because SureWest's confusion resulted from one-time rule changes and circumstances that are unlikely to occur again.²¹ Such a determination would imply that special circumstances exist any time there is a rule change coupled with a change in high-cost support status. This would be contrary to the Bureau's longstanding precedent—which we affirm—that “[c]arriers are responsible for reviewing and understanding the rules to ensure that submissions are filed in a timely manner.”²²

10. Moreover, the Bureau's decision is consistent with precedent where the Bureau has denied other petitions for waiver where the ETCs did not quickly remedy their error and additional compelling facts were not present.²³ We note that despite SureWest's claims that “[w]aivers of quarterly line count data submissions raise different issues than waivers of annual certifications,”²⁴ the Commission has found that a uniform national framework that includes both data reporting and certifications is “critical” for ensuring the proper use of high-cost support, and has adopted the same support reduction approach for both types of filings, noting the “important role . . . data and certifications play in the administration of the Universal Service Fund” and the “harm that is caused when the Commission, state commissions, and USAC are delayed in being able to monitor the use of universal service funds.”²⁵

11. We disagree with SureWest's claims that the Bureau should have found good cause to grant the waiver because SureWest had timely filed an ICLS certification on June 21, 2012, a few months before the annual certification was due.²⁶ Both certification rules require that the ETC certify that it will use the relevant support for its intended purpose.²⁷ However, SureWest had different obligations and received different support when it made its ICLS certification as a rate-of-return carrier than when the annual certification was due. SureWest had certified that it would meet its obligation to use ICLS support for its intended purpose when it was receiving such support as a rate-of-return carrier. But that certification did not cover SureWest's obligations as a price cap carrier affiliate or the Connect America Phase I frozen support it received after being acquired by Consolidated on July 2, 2012.²⁸ In 2013, price cap carrier affiliates were required to use one third of their Phase I frozen support to build and operate

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Omnipoint Waiver Order). See also *Requests for Waiver by Freehold Regional High School District Englishtown, New Jersey et al.*, Order, 19 FCC Rcd 2983, 2985, para. 4 (WCB 2004) (denying a petition for waiver in the E-rate context after finding that “[c]onfusion by an applicant's staff does not constitute special circumstances for a waiver . . .”).

²¹ SureWest Application for Review at 10.

²² See, e.g., *Federal-State Joint Board on Universal Service; Corr Wireless Communications, LLC Petition for Limited Waiver of Sections 54.307(c) and 54.313(d)(3) of the Commission's Rules*, Order, 22 FCC Rcd 5000, 5002 para. 7 (WCB 2007); *Universal Service High-Cost Filing Deadlines; HTC Services, Inc. Petition for Waiver of Section 54.802(A) Deadlines for Submission of Line Count Data by Eligible Telecommunications Carriers Seeking Portable Interstate Access Support*, Order, 23 FCC Rcd 15333, 15334 para. 5 (WCB 2008).

²³ See *SureWest Waiver Order*, 28 FCC Rcd at 14854-55, para. 6 n.22 (citing to precedent where the Bureau granted waiver petitions when the ETC submitted late filings soon after the deadline and where the Bureau denied waiver petitions when the ETC submitted late filings more than a month later).

²⁴ SureWest Application for Review at 5-6.

²⁵ *December 2014 Connect America Order*, 29 FCC Rcd at 15692, para. 136; *USF/ICC Transformation Order*, 26 FCC Rcd at 17850, para. 573.

²⁶ SureWest Application for Review at 3, 8-9.

²⁷ 47 CFR §§ 54.314(d), 54.904(a).

²⁸ SureWest Application for Review at 3-4. SureWest claims that its status as a rate-of-return carrier affiliate of a price cap carrier became effective “[a]s a practical matter” October 2012 because USAC had already calculated its third quarter support for 2012 as a rate-of-return carrier. *Id.* at 4.

broadband-capable networks in areas substantially unserved by an unsubsidized competitor.²⁹ Such obligations did not apply to rate-of-return carriers. Therefore, the certification made as a rate-of-return carrier did not meet the requirements for an affiliate of a price cap carrier. Moreover, the ICLS certification did not indicate that SureWest intended to use its CAF-ICC support for its intended purpose.

12. Because a timely annual certification was not filed on SureWest's behalf, the Commission and USAC did not have assurance that SureWest intended to use its frozen support and its CAF-ICC support to meet its obligations until the certification was filed on February 19, 2013. We also note the decision cited by SureWest to suggest that the Bureau acted inconsistently with precedent involves additional circumstances that are not present here.³⁰ In that case, the Bureau had granted a petition for waiver for an ETC that had filed a certification three months before a missed filing deadline.³¹ The Bureau found there were special circumstances because the certification that the ETC made three months before as a new ETC was the *same* certification it failed to file on time when it missed the next deadline and the ETC immediately remedied the omission by filing the untimely certification less than two weeks after the deadline.³² Here, the previously filed certification was a different certification that did not cover the relevant support or the relevant obligations, and the missed filing was submitted months after the deadline.

13. This conclusion, that special circumstances did not exist, was sufficient grounds for denying SureWest's petition.³³ Nevertheless, we are not persuaded by SureWest's other arguments. While the Commission *may* take into account considerations of hardship or equity in determining whether there is good cause to waive a rule, we are not persuaded that the loss of support alone constitutes good cause to grant the waiver petition.³⁴ Where the Bureau has found that there is good cause for granting a waiver petition, the Bureau has typically relied on facts not present here in addition to the hardship caused by a reduction in support in making that finding.³⁵ If we were to hold that the public interest prong of the waiver standard is met whenever a carrier is faced with a reduction in support, that would effectively negate the public interest requirement, as this criterion would be met any time failure to meet a filing deadline resulted in reduced support.³⁶

14. We are also not convinced by SureWest's claims that the Bureau should have found good cause to grant the waiver because the missed deadline did not harm the Universal Service Fund.³⁷ As SureWest acknowledges, the Bureau noted that the section 54.314 annual certification "is a critical part of

²⁹ *USF/ICC Transformation Order*, 26 FCC Rcd at 17723, para. 150.

³⁰ SureWest Application for Review at 9 (citing *Federal-State Joint Board on Universal Service; Smith Bagley, Inc. Petition for Waiver of Section 54.809(c) of the Commission's Rules and Regulations*, Order, 16 FCC Rcd 15275 (WCB 2001) (*SBI Waiver Order*)).

³¹ *SBI Waiver Order*, 16 FCC Rcd at 15277, para. 6.

³² *Id.*

³³ *See Northeast Cellular*, 897 F.2d at 1166.

³⁴ SureWest Application for Review at 10-11.

³⁵ *See, e.g., Federal-State Joint Board on Universal Service, MCI, Inc. Petitions for Waiver of Sections 54.802(a) and 54.809(c) of the Commission's Rules*, Order, 21 FCC Rcd 14926 (WCB 2006) (granting a waiver petition based on the amount of funding at stake and the fact that MCI had just emerged from bankruptcy); *Federal-State Joint Board on Universal Service; Verizon Communications Inc. Petition for Waiver of Section 54.802(A) of the Commission's Rules*, Order, 21 FCC Rcd 10155 (WCB 2006) (granting a waiver petition based on the amount of funding at stake and the fact that Verizon filed only two business days after the deadline).

³⁶ *See also Coral Wireless d/b/a Mobi PCS Request for Review of the Decision of the Universal Service Administrator et al.*, Order, 29 FCC Rcd 9540, 9542, para. 8 (WCB 2014).

³⁷ SureWest Application for Review at 9-10.

the Commission's new national framework for accountability."³⁸ The Commission cannot fully fulfill its responsibility to oversee the use of high-cost support when an ETC fails to file its annual certification on time, which ultimately harms the end-user ratepayers that contribute to the Fund. Given that the ICLS certification that SureWest filed on June 21, 2012 did not cover its obligations as a price cap carrier affiliate, we are not persuaded by SureWest's claims that its failure to file on time did "not pose any risk" of the support being used inappropriately.³⁹

15. Finally, we are not persuaded by SureWest's argument that its loss of support is a disproportionate penalty for failing to file a timely certification. We disagree that the forfeitures the Commission imposes pursuant to its enforcement authority are an appropriate comparison for determining whether a reduction in support is reasonable.⁴⁰ We note that a forfeiture requires a carrier to pay its own funds to the U.S. Treasury while in contrast a universal service support reduction requires USAC to withhold or recover the public's funds from the carrier. Similarly, we conclude that the Eighth Amendment's excessive fines clause is not applicable.⁴¹ Because ETCs have no property interest in or right to continued universal service support,⁴² nor any right to support other than as provided for by our rules, the reduction of an ETC's universal service support payment does not constitute a payment by the ETC to the government that is subject to the Excessive Fines clause of the Eighth Amendment.⁴³

16. While we acknowledge that the Commission has since revised its support reduction approach for missed filing deadlines,⁴⁴ consistent with the Commission's precedent we find it appropriate to apply the rule and precedent that was in effect at the time the filing deadline was missed.⁴⁵ The reduction in SureWest's support was proportional to the amount of time it took to make the filing and was proportional to the total annual amount of high-cost support it receives. SureWest has not demonstrated that it should be treated differently than all other ETCs that also missed a filing deadline during this time period and similarly lost a portion of their support based on the rule in effect at the time.

³⁸ See *id.* at 9 (citing *SureWest Waiver Order*, 28 FCC Rcd at 14854, para. 6).

³⁹ *Id.* at 9.

⁴⁰ *Id.* at 11-15.

⁴¹ *Id.* at 15-16 (citing U.S. Const. amend. VIII).

⁴² See *USF/ICC Transformation Order*, 26 FCC Rcd at 17770-71, para. 293 & nn.481-82 (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Members of the Peanut Quota Holders Assoc. v. U.S.*, 421 F.3d 1323, 1334 (Fed. Cir. 2005), *cert. denied*, 548 U.S. 904 (2006); 47 U.S.C. § 254).

⁴³ See *U.S. v. Bajakajian*, 524 U.S. 321, 328-29 (1998) (citing *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (stating that "fine" was "at the time the Constitution was adopted . . . 'understood to mean a payment to a sovereign as punishment for some offense'"); *id.* at 328, 334 (holding that "the Excessive Fines Clause . . . limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense,'" and that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense") (internal quotation marks and citations omitted).

⁴⁴ Letter from David H. Solomon, Counsel to SureWest Telephone, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-71 (filed July 31, 2014) (suggesting that as an alternative, the Commission could reduce SureWest's support on a pro rata daily basis consistent with the approach we proposed and then adopted in the *December 2014 Connect America Order*).

⁴⁵ See, e.g., *Petitions for Waiver of Universal Service High-Cost Filing Deadlines, USCOC of Cumberland, Inc. and Hardy Cellular Telephone Company Petition for Waiver of Sections 54.809(c), 54.904(d), 54.313(d) and 54.314(d) of the Commission's Rules*, Memorandum Opinion and Order, 31 FCC Rcd 7386, 7388, para. 7 n.19 (2016); see also *Petitions for Waiver of Universal Service High-Cost Filing Deadlines, Advantage Cellular Systems, Inc. Petition for Waiver of the FCC's Universal Service Rules*, Order on Reconsideration, 31 FCC Rcd 3753 (WCB 2016) (acknowledging the Commission had since changed its policy in regards to missed filing deadlines, but choosing to apply the precedent that at existed at the time the ETCs filed their waiver requests).

17. Even if we were to agree that SureWest should be treated differently than all other ETCs and applied the new support reduction approach, such application of the Commission's new support reduction approach would result in a similar loss of support.⁴⁶ When taking into account the totality of circumstances including the total high-cost support that SureWest receives, the harm to the Fund caused by the amount of time it took to make the filing, and the absence of special circumstances, we are not persuaded that a difference of approximately \$500,000 outweighs the inequities that would occur by deviating from established precedent and applying a different support reduction scheme to SureWest than all other ETCs that missed a filing deadline during the same time period. We are also not convinced that we should reduce SureWest's support by some other amount that has no relation to the support reduction approaches we have adopted in this context.⁴⁷ SureWest has not demonstrated that it would serve the public interest to give it special treatment by abandoning our support reduction approaches altogether and choosing to apply some other support reduction approach that is inconsistent with the Commission's precedent and policy for high-cost filings.

18. For all of the reasons discussed and the reasons set out in the Bureau's order,⁴⁸ we find that the Bureau did not act inconsistent with precedent or policy in finding that SureWest had not demonstrated good cause for waiving the section 54.314 annual certification filing deadline. We also find that SureWest's application for review did not raise any material facts not explicitly considered by the Bureau that would otherwise persuade us a finding of good cause is appropriate in these circumstances. Accordingly, we uphold the Bureau's order and deny SureWest's application for review.

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 214, and 254, and sections 1.3 and 1.115 of the Commission's rules, 47 CFR §§ 1.3, 1.115, that this order IS ADOPTED.

20. IT IS FURTHER ORDERED that the Application for Review, filed by SureWest Telephone, IS DENIED.

21. IT IS FURTHER ORDERED that, pursuant to section 1.103(a) of the Commission's rules, 47 CFR § 1.103(a) this order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁶ Application of the new support reduction approach would result in approximately \$2.5 million in support being withheld from SureWest rather than approximately \$3 million under the approach in effect at the time of SureWest's missed filing.

⁴⁷ SureWest Application for Review at 15 (suggesting a reduction in support of \$3,000 per quarter).

⁴⁸ *SureWest Waiver Order*, 28 FCC Red at 14854-55, para. 6.

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *SureWest Telephone Petition for a Waiver of Section 54.314(d) Filing Deadlines for Submission of State Certification of Federal High-Cost Support, Petitions for Waiver of Universal Service High-Cost Filing Deadlines*, WC Docket No. 08-71.

I agree with my colleagues that SureWest violated our rules and, under court precedent, is not entitled to a waiver.¹ Specifically, our rules required SureWest to file its high-cost certification with the California Public Utilities Commission, not the FCC and the Universal Service Administrative Company (USAC).² It failed to do so. And a simple mistake is usually insufficient to justify a waiver.³

I can only concur in the result the FCC reaches today, however, because withholding \$2,925,576 in interstate common line support from SureWest for this minor filing error—as we are required to do under our rules⁴—is exceedingly harsh.

For one, SureWest’s misfiling caused no possible harm to the Universal Service Fund: Not only did the agencies charged with protecting the Fund (the FCC and USAC) have SureWest’s filing, but they also relied on the very certification at issue to dole out frozen support during the last quarter of 2012.⁵

For another, the penalty for misfiling here is wildly out of sync with penalties we normally assess where there is plausible harm. Our *Forfeiture Policy Statement*, for example, sets the baseline penalty for failing to file a required form at only \$3,000.⁶ Our precedent imposes just a \$20,000 penalty for inaccurate Universal Service Fund forms.⁷ And the Act limits the maximum forfeiture we can impose for a single violation to \$160,000, or \$1,575,000 if a single act counts as a continuing violation.⁸ The fact that SureWest’s penalty is almost twice the maximum we could impose for a single act (not to mention

¹ *Order* at paras. 8–10.

² 47 C.F.R. § 54.314(a), (c)(1); *compare* Letter from Scott K. Barber, Vice President and Chief Operating Officer, SureWest Telephone, to the Office of the Secretary, FCC, and Karen Majcher, Vice President – High Cost and Low Income Division, Universal Service Administrative Company, CC Docket No. 96-45 (June 21, 2012) (SureWest’s initial filing), *with* Letter from Scott Kitchen, Senior Manager, Regulatory Compliance, SureWest Telephone, to Director, Communications Division, California Public Utilities Commission (Jan. 24, 2013) (SureWest’s refile).

³ *Cf. NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008) (vacating waiver of missed filing deadline because “procrastination plus the universal tendency for things to go wrong (Murphy’s Law)—at the worst possible moment (Finagle’s Corollary)—is not a ‘special circumstance,’ as any junior high teacher can attest”).

⁴ 47 C.F.R. § 54.314(d)(3) (2012 ed.) (“Carriers subject to certifications filed on or before April 1 shall receive support in the third and fourth quarters of that year. Such carriers shall not receive support in the first or second quarters of that year.”). As the *Order* explains, our current rules aren’t much better. *See Order* at para. 17 (noting that SureWest’s penalty would have only been \$500,000 less under current rules); *see also* 47 C.F.R. § 54.314(d)(1)(ii) (“An eligible telecommunications carrier subject to certifications filed on or after October 9 will have its support reduced on a pro-rata daily basis equivalent to the period of non-compliance plus the minimum seven-day reduction.”).

⁵ Specifically, USAC disbursed \$1,574,373 in frozen price-cap support to SureWest in the last quarter of 2012.

⁶ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Docket No. 95-6, Report and Order, 12 FCC Rcd 17087, 17113 (1997).

⁷ *See, e.g., Easy Telephone Services d/b/a Easy Wireless*, File No.: EB-IHD-13-00010590, NAL/Acct. No.: 201332080033, FRN: 0016344368, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 14433, 14438, para. 15 (2013).

⁸ Communications Act § 503(b)(2)(B); 47 C.F.R. § 1.80(b)(2) (providing inflation-adjusted figures).

975 times the standard for late filings and almost 150 times the standard for inaccurate USF filings) highlights its absurdity.

For yet another, I do not see why SureWest's rural customers in California's Central Valley should be so heavily penalized for such a minor mistake. Recall that universal service funds come with obligations—here, the obligation to deploy broadband. Withholding this support for the last three years has meant that 6,000 unserved, struggling families have had to wait three years for service. Today's denial just means that they will have to keep waiting. That's not punishing the company. That's punishing consumers.

For all these reasons, I believe we should reexamine our rules and rethink the penalties imposed for improper high-cost certifications. I hope my colleagues will join me in that endeavor.